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Supreme Court

OF THE UNITED STATES

October Term, 1929.

No. 68.

JESSE W. CLARKE, Collector of Internal Revenue for the Twenty-first District of New York,

Petitioner,

—*v.*—

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY,

Respondent.

On Writ of Certorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR REHEARING.

WALTER W. WELCH,
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Syracuse, N. Y.

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PETITION FOR REHEARING.

Comes now the above named respondent, The Haberle Crystal Springs Brewing Company, and presents this, its petition for a rehearing in the

above cause, and, in support thereof, respectfully shows:

1. The cause was decided by the Court on a ground which was not urged by the defendant Collector, and was not considered or discussed in the briefs of either party or upon the oral argument, and was not considered or discussed by the Circuit Court of Appeals below or by the Circuit Courts of Appeals in the cases in point decided in the Third, Eighth and Ninth Circuits, or in the cases decided in any of the District Courts or by the Board of Tax Appeals in passing on the questions involved.

The cause is one of first impression and of interest to a large number of taxpayers. Counsel respectfully suggests that if a cause of first impression is deemed to turn upon a ground not urged by counsel or discussed by courts below or suggested by the Court itself in the course of the oral argument, opportunity should be afforded to counsel to argue such ground.

2. As indicated in the opinion, the decision of the Court rests mainly on the ground that Congress did not intend that brewers should receive compensation for the destruction of their property through prohibition either directly or as "a partial compensation in the form of abatement of taxes otherwise due."

Counsel respectfully submits that the question involved was not one of compensation in any form.

The taxpayer is not claiming compensation in any form for the loss of its property due to prohibition. The question was solely one of determining the true net income of the taxpayer (a brewer) for a period after prohibition had become imminent and turned wholly on the construction of the provisions of the Revenue Act of 1918, particularly Section 234(a)(7). Under that Act the income tax provided for was measured by the net income of the taxpayer. Section 234(a)(7) provided for the deduction in determining such net income of "a reasonable allowance for exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolesence" without any express limitation. The making of an appropriate deduction with respect to property of any character is thus made a matter of the determination of the measure of the tax. The taxes due cannot be determined without first determining the construction of the statute.

To permit such a deduction in determining net income is not to allow compensation. But to deny a deduction to a particular taxpayer actually or prospectively sustaining an admitted loss is to discriminate against and penalize such taxpayer.

Counsel submits that the question should have been decided as a matter of the determination of net income under the language of the Act, not as a matter of the direct or indirect securing of compensation for the admittedly lawful destruction of a business.

3. If the question is properly to be regarded as turning on the construction of the Revenue Act, counsel respectfully submits that the opinion of the Court sets forth no ground upon which the taxpayer, a brewer, is properly denied the benefit of Section 234(a)(7).

The opinion states:

> "It is incredible that Congress * * * should have meant to enable parties to cut down their taxes on such grounds."

Also,

> "Congress cannot be taken to have intended such a partial compensation to be provided for by the words 'exhaustion' or 'obsolescence'."

It is respectfully submitted that, as this Court has often said, the intent of Congress is to be collected only from the words and language of the Act, supplemented, if not plain, by its legislative history, and administrative construction. Nowhere in the Act nor in its history is there expressed any intent to limit the application of Section 234(a)(7) or to deny the benefit of that section to brewers whose property is in fact subject to exhaustion, wear, tear or obsolescence resulting from prohibitory legislation, or any other cause.

In this case, as said by the Court in its opinion, prohibition destroyed the good will value of the business of the taxpayer. There was no dispute

that such destruction was foreseen in the early part of 1918 and took effect in January, 1920.

The contention of the petitioner is not that "exhaustion" or "obsolescence" described the destruction of the business but that from the time when the destruction of the business through prohibition became inevitable exhaustion or obsolescence of the good will property of the brewer occurred. Such property thereafter had a limited useful life and was in the process of becoming exhausted or obsolete.

There is in the opinion of the Court no statement of any reason why the terms "exhaustion" and "obsolescence" do not aptly cover what was occurring to the taxpayer's good will because of prohibition, in exactly the same sense as such terms cover what occurs with reference to patents or leases as their useful life is being exhausted by passage of time. (See Art. 163 of Reg. 45 [1919]).

4. The Court's decision results in great inequality between taxpayers. Substantially all of the cases for 1918, 1919 and 1920 were finally closed before 1927, under Bureau Regulations allowing brewers and distillers obsolescence of good will. In *Brewster v. Gage,* (Jan. 6, 1930), the Court supported its decision confirming the long standing Regulations of the Bureau by stating:

> "A reversal of that construction would be likely to produce inconvenience and result in inequality."

This statement applied with full force to the present case.

II.

SEPARATE AND ADDITIONAL GROUND FOR RE-HEARING.

The findings of fact as made by the Referee upon the trial of this action never have been reversed, modified or set aside by any Court and the whole record containing all the evidence given upon the trial herein, including all said findings is before this Court and is the record upon which this Court reversed the judgment herein of the U. S. Circuit Court of Appeals, Second District.

The taxpayer herein was on March 1, 1913, the owner and holder of 130 contracts (fol. 1648), on January 20, 1918, was the owner and holder of 131 of those contracts and on Oct. 3, 1918, was the owner and holder of 103 of those contracts (See Ref. findings 1150-1151), which said contracts (See contract fols. 1441-1477) gave the taxpayer control of N. Y. State liquor tax certificates and thereunder could transfer them from person to person and from place to place and those contracts so owned and held by the taxpayer were assignable and transferrable.

Those 130 contracts were on March 1, 1913, worth and had a market value of $2500.00 each in all of the value of $325,000.00 (fol. 1152) and the

taxpayer paid as high as $3000.00 for one of those contracts in October, 1913 (fol. 732).

Those contracts and their value were wholly destroyed by the Federal Prohibition Legislation and they were of no value after October 28, 1919, thus indicating an obsolencence of those assets of $325,000.00 (See Ref. findings fol. 1152).

The taxpayer is entitled to a deduction on account of the obsolescence of those contracts, the same as on any other contract, lease or patents and copyrights of limited duration. As to patents, see Kannel Revolving Door Co. v. Commissioner, 11 B. T. A. 1209; Perfect Window Regulator Co. v. United States, 66 Ct. Cl.—, June 18, 1928. As to leases, see Lynch v. Alworth-Stephens Co., 267 U. S. 64, 45 S. Ct. 274, 69 L. Ed. 660; Philip Henrici Co. v. Reinecke, 3 F. (2d) 34 (D. C. N. D. 111); Kaufman-Strauss Co. v. Lucas, 12 F (2d) 774 (C. C. A. 6); Appeal of Grosvenor Atterbury, 1 B. T. A. 169; Appeal of Secor Hotel Co., 7 B. T. A. 158; Hawaiian Sugar Co. v. Commissioner, 13 B. T. A. 683. As to contracts, see International Curtis Marine Turbine Co. v. United States, 63 Ct. Cl. 597; Kentucky Tobacco Products Co. v. Lucas, 5 F. (2d) 723 (D. C. W. D. Ky.); Lassen Lumber & Box Co. v. Blair, 27 F. (2d) 17 (C. C. A. 9); Appeal of Atlantic Carton Corp., 2 B. T. A. 380.

Those contracts are alleged and set up in the complaint herein (fols. 45-49).

The Referee found the deduction for obsolescence of the good will of the taxpayer in the fiscal year 1919 was $89,071.55 and based the taxpayer's judgment thereon (fol. 1120), and this did not include the obsolencence of any of said contracts or their total loss.

That said Referee erroneously refused to find that the taxpayer herein was entitled to an independent deduction on account of the obsolencence of said contracts to which the taxpayer filed exception (fols. 1179-1183).

That the question of the obsolescence of those 130 contracts was not raised in this case in the Circuit Court of Appeals, Second District, by any of the attorneys for either party.

That had the attorney for the Collector herein or had this Court upon the argument raised the question on which it herein reversed the judgment of the Circuit Court of Appeals, Second District, as appears from this Court's opinion written upon such reversal, the taxpayer's attorney could have brought to this Court's attention said contracts and their obsolescence and loss, but on account of the failure of the Court or any one else to raise or suggest the question on which this case was decided the taxpayer feels that he has been deprived and foreclosed of his rights that it would otherwise have had if such a question had been raised or suggested by the Court or any one else.

That in the event that this Court should grant a rehearing herein and on such rehearing should hold that the judgment herein of the Circuit Court of Appeals, Second District, could not be affirmed or upheld on account of the loss of the taxpayer's good will of its business, then and in that event said judgment should be affirmed and upheld by this Court on account of the taxpayer's loss and obsolescence of said contracts independent of the taxpayer's loss of the good will of its business, which obsolescence of said contracts is more than sufficient in amount to uphold and require an affirmance of said judgment.

For the foregoing reasons it is respectfully urged that the petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, affirmed.

Respectfully submitted, Walter Welch.
WALTER WELCH,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

I, Walter Welch, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay. Walter Welch.
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